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CORPORATE INTELLECTUAL PROPERTY
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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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*Ex parte* STEVE PABOOJIAN, CARLOS SCHULER,
and ANDREW CLARK

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Appeal 2009-003637
Application 09/731,318
Technology Center 3700

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Decided:[1] July 13, 2009

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Before DONALD E. ADAMS, JEFFREY N. FREDMAN, and STEPHEN WALSH, *Administrative Patent Judges*.

FREDMAN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving a claim to a receptacle. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

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[1] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

*Statement of the Case*

*The Claims*

Claims 1-4 are on appeal. Independent claim 1 is representative and reads as follows:

> 1. A receptacle comprising:
> a receptacle body that defines an enclosed cavity containing powdered medicament, wherein the receptacle body has a top end and a bottom end; and wherein the bottom end of the receptacle body includes a raised central region that extends upwardly into the cavity.

*The prior art*

The Examiner relies on the following prior art reference to show unpatentability:

| | | |
|---|---|---|
| Watt et al. | US 3,980,074 | Sep. 14, 1976 |

*The issue*

The Examiner rejected claims 1-4 under 35 U.S.C. § 102(b) as anticipated by Watt (Ans. 3).

The Examiner finds that "Watt et al. teaches a receptacle comprising: a receptacle body that defines an enclosed cavity containing powdered medicament (col. 2, lines 27-28), wherein the receptacle body has a top end and a bottom end, and wherein the bottom end of the receptacle body includes a raised central region that extends upwardly into the cavity" (Ans. 3).

Appellants contend that "Watt et al does not disclose an ***enclosed*** cavity. Instead, the cavity of Watt et al has several openings, such as vents 11 and opening 2" (App. Br. 3). Appellants contend that "[a]s discussed throughout Appellant's specification, the powder medicament is contained

within an enclosed cavity, such as a sealed blister pack (see page 7, lines 25-35). In this way, the powder medicament may be stored on the shelf prior to use and may be protected from the environments degrading effects" (App. Br. 3).

In view of these conflicting positions, we frame the anticipation issue before us as follows:

Did the Examiner err in finding that Watt teaches a "receptacle body that defines an enclosed cavity" as required by claim 1?

*Findings of Fact (FF)*

1. The Specification teaches that "[t]he invention provides exemplary techniques and equipment for extracting powder that is held within a receptacle, typically within a sealed cavity" (Spec. 7, ll. 25-26).

2. The Specification teaches that the

> powders of the invention may be extracted by creating an opening or access way into the receptacle and then flowing air or other gases through the receptacle to move the powder out of the access way. Conveniently, one or more vents may also be created in the receptacle to facilitate the flow of air through the receptacle.

(Spec. 8, ll. 1-4.)

3. The Specification teaches that

> the receptacles may be constructed to have preformed holes and/or vents. In this way, the top surface of the receptacle does not need to be pierced when inserting the extraction tube or forming the vents. Conveniently, a removable cover may be placed on top of the receptacle. After insertion into an

> aerosolizing apparatus, the cover may be pulled from the receptacle to expose the holes and/or vents.

(Spec. 9, ll. 28-33.)

4. Figure 3 of the Specification is reproduced below:

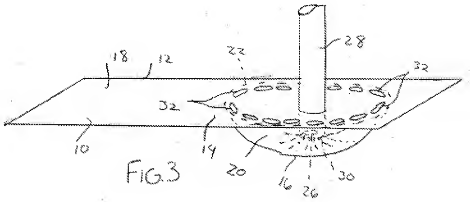


FIG.3

"Fig. 3 is a perspective view of the receptacle of Fig. 1 showing vents formed in a top end and an extraction tube that has been inserted into the top end" (Spec. 6, ll. 26-28).

5. Watt teaches a "container having one or more air inlet vents adapted to direct incoming air into a turbulent stream within the container . . . whereby the intake of breath by the user of the device causes powder within the container to be fluidized, to pass into the vortex of air in the housing" (Watt, col. 1, ll. 46-52).

6. Watt teaches that

> the inhalation device comprises a hollow elongate housing 1, made of plastic material. One end of the housing is provided with an outlet 2 of restricted diameter which serves as a mouthpiece. The other end of the housing 1 is provided with a powder container 3 comprising a body 4 and a flange 5, the latter being integral with the housing; and an extension 6 of the housing protrudes into the container. The container

> body 4 and flange 5 are joined by means of screw thread 7. The base 8 of the container has a central protuberance 9 producing an annular trough 10. The flange 5 of the container is provided with a number of air inlet vents 11, drilled at a constant angle to the longitudinal axis of the housing 1, this angle preferably being in the range 40°-85°. The configuration of these vents is shown more clearly in FIG. 3.

(Watt, col. 2, ll. 3-18.)

7. Watt teaches a container as in Figure 1, reproduced below:

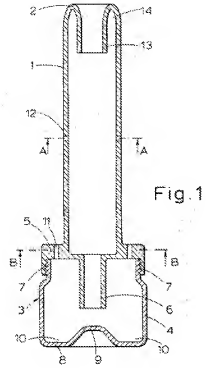


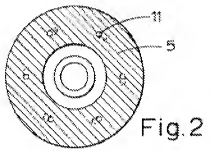

Fig. 1

"FIG. 1 is a cross-section through the major axis of an oral inhalation device" (Watt, col. 1, ll. 57-58).

8. Watt teaches that "the base 8 of the container 3 has a central protuberance 9. This provides the annular trough 10 for the powder and

reduces the likelihood of a dense cloud of powder passing towards the outlet vent 2 at the onset of inhalation" (Watt, col. 2, ll. 57-61).

9. Figure 2 of Watt is reproduced below:




"FIG. 2 is a cross-section through the line A-A of FIG. 1" (Watt, col. 1, ll. 60-61).

10. Watt teaches that the "housing 1 also has inlet vents 12 again drilled tangentially as shown in FIG. 2" (Watt, col. 2, ll. 19-20).

11. The Examiner finds that the word "enclosed" is defined as "surrounded by walls, objects or structures" (Final Rej. 2).

*Principles of Law*

"A rejection for anticipation under section 102 requires that each and every limitation of the claimed invention be disclosed in a single prior art reference." *In re Paulsen*, 30 F.3d 1475, 1478-79 (Fed. Cir. 1994); *see Karsten Manufacturing Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383 (Fed. Cir. 2001) ("Invalidity on the ground of 'anticipation' requires lack of novelty of the invention as claimed … that is, all of the elements and limitations of the claim must be shown in a single prior reference, arranged as in the claim.").

"[T]he PTO gives a disputed claim term its broadest reasonable interpretation during patent prosecution." *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004). The court recognizes the fairness of reading claims broadly "before a patent is granted [since] the claims are readily amended as part of the examination process." *Burlington Indus., Inc. v. Quigg*, 822 F.2d 1581, 1583 (Fed. Cir. 1987). "Thus, a patent applicant has the opportunity and responsibility to remove any ambiguity in claim term meaning by amending the application." *Bigio*, 381 F.3d at 1324. Applying the broadest reasonable interpretation to claims also "'serves the public interest by reducing the possibility that claims, finally allowed, will be given broader scope than is justified.'" *In re Am. Acad. Of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004).

*Analysis*

Watt teaches a receptacle body with a cavity with powdered medicaments that has a top end and a bottom end (FF 5-7). Watt teaches that the receptacle has a raised central region that extends upwardly into the cavity (FF 7-8). Watt also teaches that the receptacle has vents in the top end (FF 5-7, 9-10).

The dispute centers on whether the cavity within the receptacle of Watt is an "enclosed cavity" as required by claim 1. Appellants contend that "Watt et al does not disclose an ***enclosed*** cavity. Instead, the cavity of Watt et al has several openings, such as vents 11 and opening 2" (App. Br. 3). Appellants equate enclosed with sealed, referencing the discussion of the sealed blister pack in the specification (*see* App. Br. 3).

However, while the Specification discusses a sealed blister pack as a receptacle (*see* Spec. 7, ll. 25-35; FF 1), the Specification expressly discusses receptacles having vents (FF 2-4). The Specification states that "one or more vents may also be created in the receptacle to facilitate the flow of air through the receptacle" (Spec. 8, ll. 3-4; FF 2).

The Specification also states that "the receptacles may be constructed to have preformed holes and/or vents. In this way, the top surface of the receptacle does not need to be pierced when inserting the extraction tube or forming the vents" (Spec. 9, ll. 28-30; FF 3).

Appellants admit that "openings may be preformed into the enclosed cavity and these preformed openings include a removable cover that allows for access to the cavity" (App. Br. 4). However, the claim simply requires a receptacle comprising an "enclosed cavity" and the receptacle in claim 1 is open as to whether the cavity comprises the removable cover or not.

Therefore when interpreting the receptacle with an "enclosed cavity" as required by claim 1 in light of the Specification, the "enclosed cavity" is reasonably interpreted to encompass receptacles with cavities which can comprise vents, since the Specification expressly teaches receptacles with vents (FF 1-4).

We are not persuaded by Appellants' arguments that "[t]he cavity of Watt et al is not 'enclosed'" (App. Br. 3). Appellants own Specification discloses embodiments with vents (FF 2-4) and suggests regarding blister packs that "the invention is not intended to be limited to these specific types of receptacles" (Spec. 7, ll. 33-34). Further, the ordinary meaning of the word "enclosed" does not require that the "enclosed cavity" is sealed, only

that it is "surrounded by objects" such as a vented lid (*see* FF 3, 4, 11). Had Appellants wished to limit the claim to a receptacle without vents, Appellants have *ipsis verbis* support for a "sealed cavity" (*see* Spec. 7, l. 26) which would have excluded vents such as those disclosed in Watt.

We are also not persuaded by Appellants' argument that "openings of the type described by Watt et al would prevent one of ordinary skill from viewing the cavity of Watt et al as being enclosed" (Reply Br. 4). Appellants argue that because the vents permit the powder to exit, the cavity in Watts with vents cannot be "enclosed." However, in the receptacles of both Watts and the Specification, vents are present with a cavity which is intended to retain the powder until the patient inhales (*see* FF 5). Consequently, Appellants attempt to limit "enclosed" to "sealed" is not found persuasive.

*Conclusion of Law*

The Examiner did not err in finding that Watt teaches a "receptacle body that defines an enclosed cavity" as required by claim 1.

SUMMARY

In summary, we affirm the rejection of claim 1 under 35 U.S.C. § 102(b) over Watt. Pursuant to 37 C.F.R. § 41.37(c)(1)(vii)(2006), we also affirm the rejection of claims 2-4, as these claims were not argued separately.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv)(2006).

AFFIRMED

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